IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

MOTION OF HUDSON WATERWAYS CORPORATION, COVE SHIPPING INC., SEA TRAIN LINES, INC., APEX MARINE CORP., MOORE McCORMACK LINE, INC., AND UNITED STATES LINES, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* SUGGESTING THE EXISTENCE OF A VITAL ISSUE TO BE RESERVED FOR A FUTURE, PROPER CASE.

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To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Hudson Waterways Corporation, Cove Shipping Inc., Sea Train Lines, Inc., Apex Marine Corp., Moore McCormack Line, Inc., and United States Lines, Inc., hereby move for leave to file as amici curiae the accompanying brief in the above captioned proceeding. Consent to the filing of the brief has been withheld by counsel for William E. Bloomer, Jr.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae consist of individual American steamship companies whose operations are nationwide. They are believed to be representative of American and foreign steamship companies which conduct business in the United States and which are thereby subject to personal injury suits by waterfront workmen brought by virtue of § 905 (b) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*

Through the annexed brief, amici curiae seek to inform this Court that there exists a vital issue concerning an alleged "lien" which is commonly thought to exist in every case in favor of stevedoring companies over the proceeds of suits brought by compensated longshoremen in "third-party" actions against shipowners. Clearly, the issue of the existence of this "lien" in all circumstances is not before the Court in this proceeding. Rather, the Court is being asked to address itself to the narrower question whether, in the event that a stevedore (or its insurer) *is conceded to be* entitled to recover its compensation liability, some portion of the cost of the legal proceeding necessary to effect this recapture should be borne by the stevedore.

In dealing with what is essentially a question of apportionment of the proceeds of petitioner's recovery against the shipowner, the Court may, in our respectful submission, mistakenly view the larger issue of the existence and nature of the so-called "lien" to be an essential preliminary consideration. The purpose of intervention by amici curiae in this proceeding is to suggest that this Court refrain from commenting upon the entitlement of stevedoring companies to the so-called "lien" in all cases, particularly those which involve issue of concurrent stevedore negligence, and that it limit its discussion to the particular facts in this proceeding in which no such issue was raised.

Amici curiae, as well as all vessel owners similarly situated, are vitally interested in ensuring that any "lien" right permitting stevedoring companies to recover the amounts which they have paid to their employees in compensation under § 907 and § 914 of the Act not be extended to those situations in which the stevedoring companies have themselves contributed to the injury of the longshoremen by their negligence. Amici curiae believe that their position on this issue will be sustained when it is raised in a future and proper case. In this proceeding, in which the interests of injured longshoremen, the plaintiffs' bar and stevedoring companies are alone represented, all parties before the Court and those heretofore amici curiae *assume* the existence of the unqualified "lien" right of a negligent stevedoring company to recoup its compensation liability depending only on proof of some shipowner negligence and the amount of the verdict. The annexed brief is offered, then, to afford this Court an opportunity to consider a perspective on this vital issue which has not been and will not be presented by any of the other participants in this proceeding.

In offering this brief, amici curiae are truly responding as "friends of the court" as that role has been defined in Black's Law Dictionary, 4th edition, 1951:

> *AMICUS CURIAE*
>
> A bystander (usually a counsellor) who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken, *Fort Worth & D.C. Railway Co.* v. *Great House,* Tex. Civ. App., 41 S.W.2d 418, 422; or upon a matter of which the court may take judicial cognizance. *The Claveresk,* CCANY, 264 F. 276, 279; *In Re Perry,* 83 Ind. App., 456, 148 N.E. 163, 165. Implies friendly intervention of counsel to remind court of legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong. *Blanchard* v. *Boston & M.R.,* 86 N.E. 263, 167 A. 158, 160.

The nature of the intervention of amici curiae in this proceeding is such that the annexed brief does not and cannot support the position taken by either of the party litigants. Since an amicus curiae participates only for the benefit of the Court, it is not necessary that its position represent the views or interests of the litigants. *Alexander* v. *Hall,* 64 F.R.D. 152 (D.SC., Columbia Division, 1974).

Amici curiae wish to make it perfectly clear that they do not seek, nor would it be proper to do so, to raise for this Court's *determination* an issue which has concededly not been raised or supported by the parties herein. Rather, well aware that the issue of a negligent stevedore company's entitlement to participate in a longshoreman's recovery against a shipowner can only be resolved on facts which are not present here (i.e. a finding of negligence on the part of the stevedore employer), amici curiae merely seek to alert the Court to the *existence* of that issue in order that it may be reserved for consideration in a future and proper case.

Accordingly, amici curiae respectfully request leave to file the annexed brief.

Dated: New York, New York
November 30, 1979

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae consist of individual American shipowning companies whose vessels are potentially the site of accidental injuries to longshoremen and who are thus subject to suits by such employees of independent contractor stevedoring companies as provided by § 905(b) of the Longshoremens' and Harbor Worker's Compensation Act (33 U.S.C. § 901 *et seq.*). They are "third parties" sueable in accordance with the provisions of § 933 of the Act. It is believed that they are representative of American and foreign shipping companies doing business in the United States who are exposed to suits for personal injuries by waterfront workers and who are vitally interested in an interpretation of the 1972 Amendments to the Longshore-

mens' and Harbor Worker's Compensation Act which achieves the stated goals of Congress.

In this case, the parties and those heretofore amici curiae address a secondary issue of apportionment of the proceeds of a settlement fund, after assuming as a preliminary matter that a stevedore (or, if appropriate, by virtue of § 933(h) of the Act, its workmen's compensation insurer) has a "lien" on the proceeds of a compensated longshoreman's § 905(b) suit against a shipowner.

The interest of amici curiae in this case is only to urge this Court that it would be inappropriate to consider the right of a stevedoring company (or its subrogated workmen's compensation insurer) to recover its compensation liability as if stevedore negligence had contributed to the cause of plaintiff's injuries and as though that fact had been demonstrated. The question presented to this Court by petitioner is whether, in circumstances where the stevedore's freedom from concurrent negligence was conceded, the compensation insurance carrier for the stevedore may recover its entire "lien" from the longshoreman's recovery or whether he must share proportionately in the longshoreman's expense of obtaining that recovery, including plaintiff's attorney's fee.

Any determination of the sharing of the expense of "lien" recapture would, had it been a litigated matter, have necessarily required a determination of the nature of the stevedore's interest in this longshoreman's negligence suit against the shipowner. This case was, however, settled, and the district court held that the nature of this interest was a lien on the proceeds of suit and that this interest was sufficient to support a petition to intervene in order to assure, by court order, that the full amount of the "lien" (i.e. the stevedore's insurer's total cost of benefits paid plaintiff pursuant to §§ 907 and 914 of the Act) would be repaid to it without diminution by any proportionate sharing of the plaintiff's attorney's contingent fee. That is, the shipowner did not resist the claim of "lien" from which fact this Court should infer that petitioner's injuries were caused *only by* ship's negligence.

Indeed, this Court *must* infer only that the "lien" was repaid because the shipowner appreciated that there was no basis in fact for belief that any negligence of the stevedore caused or contributed in any way to the occurrence of injury to plaintiff. For if it were otherwise, because of this Court's decision in *Federal Marine Terminal, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), the shipowner would have had a defense available to it that proof of stevedore negligence is a complete bar to any direct suit by a compensation-paying stevedore against a third-party shipowner. But Mr. Bloomer's personal injury suit, brought in his name alone, purported to provide a vehicle for recovery by him of his actual damages (i.e. those amounts the trial jury might have determined were owed to him in excess of compensation benefits previously received) and for recovery by the stevedore, through the device of a "lien on proceeds," of its entire compensation expense. Had stevedore negligence been a provable fact in Mr. Bloomer's personal injury suit, the shipowner could have challenged the action, in its latter aspects ("lien on proceeds"), by assertion of a Rule 17 F.R.Civ.P. real party in interest defense or under Rule 19 F.R.Civ.P. by adding the stevedore's insurer as an additional party.

This analysis, however, depends upon two more fundamental considerations which are:

(1) That the law as expressed by this Court in *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 381-382 (1949), provides that a workmen's compensation insurance underwriter who pays compensation to an injured employee of an assured succeeds, by payment, to that part

of the employee's claim for damages against an allegedly negligent third-party as "owner" of that cause of action up to the amount of the benefits paid; and

(2) That this Court will not sanction a result by which a negligent stevedore, who declines to sue a shipowner on its *direct* cause of action because of the "no-contribution" rule (which was held to apply to this type action in *Burnside, supra*), can *indirectly* recover against the shipowner merely by encouraging the employee to sue and then asserting that it has an "equitable" lien on the proceeds of suit. To permit such a result would effectively abrogate Rule 17 F.R.Civ.P. with respect to longshoremens' personal injury suits. It must therefore be assumed that, in the instant case, defendant shipowner was aware of but declined to raise a Rule 17 defense *because the stevedore was not negligent.*

Amici curiae wish only to suggest to this Court the existence of a preliminary issue which, if it had been raised, would have been of vital importance to them as well as to the entire maritime industry and to the admiralty bar. This issue is not whether a blameless stevedore should be reimbursed for its compensation costs occasioned by the negligence of a "third party" shipowner. The issue of concern is whether, if (as is typically the case) the stevedore is *also* negligent, the burden of compensation should, in justice, be shifted from what may be an overwhelmingly negligent stevedore to a minimally negligent shipowner. It is this issue which amici curiae urge the court need not and should not decide. This is the issue that should be reserved for determination in a future, proper case.

This brief is submitted out of concern that the Court may indicate in a majority opinion, as did a three justice minority of this Court in *Edmonds* v. *Compagnie Generale Transatlantique,* —— U.S. ——, 99 S. Ct. ——, 61 L. Ed. 2d 521 (1979), that the stevedore's insurer has a right to a

"lien" on the proceeds of a suit instituted by a compensated longshoreman in every case, irrespective of proof of stevedore's negligence.

The three justice minority in *Edmonds* assumed that as a result of the majority holding ". . . the stevedore, who, the jury determined, was 70% at fault, will recoup its statutory compensation payments out of the damages payable to Edmonds and thus will go scot-free" (at p. 536, footnote 1) and that "[u]nder the judicially created lien sanctioned by the Court's opinion" the stevedore's insurance company would recover its incurred compensation benefits of at least $49,152.00 out of the $90,000.00 damages awarded.

But this Court's holding *did not* decide that a negligent stevedore would, indeed, go "scot-free" as the issue was not before the Court. The shipowner in *Edmonds,* as in the instant case, did not join the stevedore as a Rule 19 F.R.Civ.P. party and the "determination" of 70% stevedore negligence by the jury was reached at a trial in which the stevedore did not participate. The *Edmonds* record surely demonstrates that the single issue before the Court was whether the shipowner could reduce its liability for plaintiff's "damages"[1] by the percentage of negligence contributed by the stevedore to the plaintiff's injury. The issue of whether an *assumed* negligent stevedore was entitled to recover the "lien" was, and, amici curiae believe, still is an undecided one; it can be decided only *after* the fact of stevedore negligence has been established by yet another jury at a trial in which the stevedore is a joined party. See

1. Hence, the "damages" of plaintiff with which the Court should be understood to have been concerned was the amount of the jury award *in excess of* compensation previously paid. There can be no double recovery by a longshoreman of both the total amount of a jury award and compensation. This distinction was lost because the shipowner conceded a right to double recovery, but only to the extent that the recovery of "damages" would be an additional amount representing only the shipowner's negligence.

Edmonds v. *Compagnie Generale Transatlantique,* 577 F.2d 1153 (at p. 1156), rev'd, *supra.*

Indeed, far from affirming the existence of a "lien" in all cases the *Edmonds* majority indicated, with respect to the vital question of the rights of a stevedore's insurer in a case where a stevedore contributes negligently to the cause of a longshoreman's accident, only that "if [the stevedore] has lien rights in the longshoreman's recovery it may be out-of-pocket even less" (at pp. 532-533). Further, the majority opinion distinguished a suit brought by a stevedore pursuant to a § 933(b) assignment from a suit brought by the individual longshoreman within six months of acceptance of an "award" of compensation, stating (at p. 533) that, in the latter instance, a "corresponding judicially-created lien in the employer's favor operates where the longshoreman himself sues."[2]

The entire purpose and extent of the interest of amici curiae is to attempt to pursuade the Court that it need not and should not suggest that it is appropriate for the district courts to determine the relative rights of the parties interested in a typical longshoreman's personal injury action in a way which entitles a negligent stevedore to avoid its compensation liability depending only on whether some shipowner negligence can be proven. In short, it is submitted that the stevedore's "lien" in such circumstances (in any case in which stevedore negligence is proven) does *not* exist, and, accordingly, the shocking inequity of what this Court's *Edmonds'* minority thought would result from the majority's refusal to visit the effect of concurrent stevedore negligence on an innocent longshoreman need not be.

Edmonds did hold that this Court will not retroactively alter what was understood to be the law because to do so

2. The Court cited *The Etna,* 138 F.2d 37 (3d Cir. 1943). Amici curiae assert that this case was tacitly overruled by *Federal Marine Terminals, Inc.* v. *Burnside, supra.*

would distort the delicate balance effected by Congress. This means that the question of a negligent stevedore's right to recover its compensation expenses must be determined by reference to the law expressed by this Court *before* 1972, by changes in the statute enacted prior to that time or by considerations of congressional purpose in enacting the 1972 amendments. What follows assumes this fact, as well as this Court's continuing commitment to a belief that whatever inequities result as between a shipowner and stevedore, the interest of the injured longshoreman is paramount and that whatever inevitable inequity exists in the present statutory scheme, *if any,* it will not find as its victim the injured longshoreman.

Amici curiae do *not* claim that the writ of certiorari in this proceeding was improvidently granted nor that for any other reason this Court is without power to determine the question presented. To the contrary, amici curiae urge that the question be decided and seek to present no argument whatsoever for or against the proposition that plaintiff's attorney is or is not entitled to ask a fee from the compensation underwriter for vindicating the right of this blameless stevedore who, *because* blameless, was and is enitled to be fully reimbursed by this negligent shipowner for all compensation expenses it incurred or for such sum as remains after deduction of an appropriate fee.

DISCUSSION OF THE VITAL ISSUE TO BE RESERVED AND DETERMINED BY THE COURT IN A FUTURE, PROPER CASE, TO WIT: A "LIEN" ON PROCEEDS DOES NOT EXIST IN FAVOR OF A NEGLIGENT STEVEDORE.

Evaluation of the vital issue suggested by amici curiae requires review of decisions by this Court and courts of inferior jurisdiction over the twenty-seven years between this Court's decisions in *American Stevedores* v. *Porello,* 330 U.S. 446 (1947), and *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974).

As the Court is aware, the 1972 amendments to the Act repealed this Court's decision in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), and *Ryan Stevedoring* v. *Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956), by providing in § 905(b) that (1) a person entitled to compensation and "anyone else otherwise entitled" may sue the shipowner and recover for negligence only and (2) that in no event shall the stevedore be liable for "such damages directly or indirectly." Hence plaintiff cannot recover for unseaworthiness (*Sieracki*) and the shipowner cannot recover indemnity from the stevedore (*Ryan*). But what of the obvious interest of the stevedore or its compensation insurer in the amount of compensation paid to plaintiff as a result of the accident in suit?

Since the 1972 amendments, stevedore companies claim that upon proof to a jury's satisfaction of even trivial negligence on the part of the shipowner, plaintiff recovers his full damages solely from the shipowner, from which sum the stevedore must be reimbursed for all or a part, depending only on the size of the verdict, of its compensation liability through assertion of a so-called lien on the proceeds of plaintiff's suit. This "lien" is said, on one hand, to be "equitable" and, on the other, to be wholly unaffected by proof of stevedore negligence in bringing about the injury for which the longshoreman has successfully sued the shipowner. This resolution, sanctioned by numerous courts of both trial and appellate jurisdiction but not yet by this Court since the 1972 amendments, can be readily seen as both unfair and unworkable and has been so acknowledged by virtually every court which has sanctioned it.

In the view of amici curiae, the problem is in the perpetuation of the concept that the stevedore has an *unrestricted* right to recover compensation expenses depending solely upon proof of shipowner negligence. The solution is to

achieve an interpretation of the amendments treating the stevedore's interest as a "claim" or "cause of action" against the shipowner, which is subject to defeat by proof of stevedore negligence causing the injuries in suit—this because no other scheme of loss apportionment between shipowner, stevedore and individual longshoreman can be sanctioned by this Court in light of the expression of Congress's will in enacting the 1972 Amendments.

The other arguments which were offered and rejected are:

(1) that the shipowner may claim a right to a *pro rata* or, in the uncomplicated case, a one-half reduction in its liability to the longshoremen on the basis of the so-called "Murray Credit." See *Lucas* v. *"Brinknes" Schiffahrts Ges. Franz Lange G.M.B.H. & Co.,* 379 F. Supp. 759, 387 F. Supp. 440 (E.D.Pa. 1974).

(2) that the shipowner may claim that it is not liable to the longshoremen for the degree of fault of the stevedore along lines urged without success in *Shellman* v. *United States Lines, Inc.,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1975).

(3) that the shipowner may claim that it is not liable to the longshoreman for the degree of fault of the stevedore, and concede, in order to make unnecessary the joinder of the stevedore in the longshoreman's suit, that the employee is entitled to a "double recovery" to include complete compensation and that part of his damages attributable to the shipowner's fault alone (*Edmonds* v. *Compagnie Generale Transatlantique, supra*).

All of these approaches lack consistent justification since they do not necessarily effect a complete and fair resolution as between stevedore and shipowner, and more importantly, because they might reduce the verdict in favor of a longshoreman on the basis of the negligence of co-employees over whom the longshoreman has no control.

Shellman, supra, was, of course, essentially a more sophisticated "Murray Credit" which sought to reduce the shipowner's liability to plaintiff depending only on the basis of the number of parties (stevedore and shipowner) negligent with respect to plaintiff in causing the injury sued for while *Shellman* sought reduction to the *degree* of the stevedores' negligence. But if one thing is clear from the history of the interpretation of the Longshoremens' and Harbor Worker's Compensation Act in the last 30 years, it is that the Supreme Court considers the interests of the individual longshoreman to be paramount and that if any interpretation of the Act is to be "unfair" to any of the three parties interested, it will not be along lines "unfair" to the plaintiff longshoreman. Reduction of a longshoreman's recovery on the basis of anyone's negligence other than his own is clearly a resolution unacceptable to this Court.

However, on two occasions, in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952), and *Pope & Talbot* v. *Hawn,* 346 U.S. 406 (1953), this Court rejected a resolution of the continuing problem on the basis of limiting the stevedore's "contribution" to its compensation liability and specifically endorsed a result which required a negligent shipowner to repay to a negligent stevedore the amount of the latter's incurred compensation liability, despite argument that to do so was unfair. Obviously an argument which posits that a negligent stevedore cannot recover its "lien" can only succeed if *Halcyon* and *Pope & Talbot* can be distinguished, mindful of the 1974 endorsement (*Cooper, supra*) of the *Halcyon* rule of no contribution between joint tortfeasors in situations where the Act is a factor. This we believe can successfully be done if the following analysis of the development of the law in this area is borne in mind.

The Act was adopted in 1927 and was based on the New York State Workmen's Compensation Act. In respect of

rights against "third parties," § 933(a) originally provided for an employee's election between compensation and suit against a negligent third party. In event of an election to accept compensation, § 933(b) provided that the employee's cause of action was assigned to the employer upon payment of compensation, and the employer could then start suit or compromise with the third party (§ 933(d)) and deduct from the proceeds of suit incurred compensation liability before paying the balance of any verdict obtained in the assigned cause of action to the injured employee (§ 933(e)).

In 1938, however, the Act was amended to provide for an assignment of the employee's cause of action *only* upon payment of compensation pursuant to an *award.* Pursuant to § 914 of the Act, compensation payments are to be made voluntarily by the employer, failing which the Board is empowered to order the employer to pay compensation to its injured employee. But this order was an "award" of compensation, and payments thereunder resulted in assignment of the employee's cause of action to the employer.

Shortly thereafter, a longshoreman received voluntary payments under the Act from his employer and successfully sued the shipowne . He then announced his intention not to repay his employer that portion of the verdict representing compensation received by him, claiming that the 1938 amendment to § 933(b) was intended to give him both compensation and damages. The shipowner, not knowing whom to pay, deposited the amount of the verdict in court, and the stevedore intervened to protect its interest in the proceeding.

These were the facts of *The Etna, supra,* in which it was held that the amendment was not designed to give the employee double recovery of both compensation and damages, about which there now can be no argument. But because the 1938 amendment was interpreted as providing for an assignment only following an award and therefore as de-

priving the stevedore/employer of its right to sue the shipowner directly where payments had been voluntarily made (and no doubt to encourage employers to continue to do so), the Court held that the employer/stevedore was entitled to a lien on the proceeds of the plaintiff's suit.

The lien may thus properly be considered "equitable" perhaps only because it was a classic expression of the function of Chancery, whereby a remedy in equity was created because the employer had no adequate remedy at law. It is clear that the stevedore's lien was characterized as equitable in this sense of the word *only*. Neither the court in *The Etna* nor the Second Circuit Court of Appeals in *Fontana* v. *Pennsylvania R.R. Co.*, 205 F.2d 151 (2 Cir. 1953) (affirming 106 F. Supp. 461, which reached the same result and which expressly linked the "lien" to the stevedore's inability to sue the shipowner) considered the question of the affect of employer negligence upon "lien" recovery.

The law establishing the stevedore's right to recover out of the proceeds of a "third party" action is wholly of judicial creation. It was (1) *required* by considerations of policy resulting from the awkward drafting of the 1938 amendments to § 933(b) of the Act (52 Stat. 1168) and (2) was the product of the belief by the courts that § 933(b) of the Act, as amended in 1938, had "cut off" the stevedore's right to sue the shipowner as assignee of the employee's right against the "third party" shipowner if compensation was paid voluntarily and not pursuant to an award.

But in *Federal Marine Terminal Inc.* v. *Burnside Shipping Co., supra,* this Court later held that § 933(b) *did not* "cut off" a stevedore's right to sue a negligent shipowner for the full amount of its damages. In that case, which involved claim of a longshoreman's wrongful death, a stevedore was allowed to sue the shipowner to recover its total compensation *exposure* despite there having been no

assignment of plaintiff's cause of action because compensation had either been paid without an award or had been paid pursuant to an award but plaintiff had sued thereafter in her own right within six months.[3]

Burnside, supra, thus made untenable the proposition advanced in *The Etna, supra,* that a stevedore was entitled to an equitable lien because deprived of a remedy at law. The significance of this Court's *Burnside* decision is best demonstrated by the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Joyner* v. *F & B Enterprises Inc.*, 448 F.2d 1185 (D.C. Cir. 1971).

In *Joyner,* the Court of Appeals acknowledged that the district court decision granting the compensation insurer Rule 19 status would have been correct had it not been for the unique effect of § 933(b) which, it said, operated to "cut off" the employer's right to sue. Hence, joinder was improper since the employer's remedy was solely a lien on proceeds. But the Court of Appeals acted in apparent total ignorance of this Court's *Burnside* opinion which clearly invalidated this rationalization. Interestingly, the Court of Appeals relied on *Pope & Talbot* which, in turn, is based on *Halcyon,* which this Court in 1974 said in *Cooper* "was and still is good law on its facts." But the "facts" of both *Halcyon* and *Pope & Talbot* have changed; the Act, and particularly § 933(b) which these cases interpreted, was later amended not (at least significantly) in 1972 but in 1959!

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3. An amendment to § 933(b) in 1959 further conditioned the employer's right to obtain an employee's cause of action by assignment by allowing the employee to retain his right to sue even when paid compensation pursuant to an award, if he brought suit within six months of the date of the award. As will be demonstrated, *infra,* the *1959* amendments completely undermined the policy considerations which motivated this Court's decision in *Halcyon* and *Pope & Talbot, supra.*

We have seen that it was erroneously decided very early on that the 1938 amendment to § 933(b) "cut off" the stevedore's right to sue the shipowner. What was then still to be considered was the impact following from the shipowner's right to sue the stevedore, first for contribution and after the 1956 *Ryan* decision for indemnity, on the "third party" rights of the individual longshoreman. This now reaches the issue of the policy considerations underlying the decisions of this Court in *Halcyon* and *Pope & Talbot*. The decision of the Third Circuit Court of Appeals in *The Etna, supra,* was concerned only with (a) denying the longshoreman a double recovery because of the supposed effect of the 1938 § 933(b) amendment and (b) providing to the stevedore, where no issue was raised of its concurrent negligence, a basis for recovery of its incurred compensation liability.

Notwithstanding (as *Burnside, supra,* later made clear) that *The Etna* court's view of the stevedore's inability to sue was incorrect in law decisions of this Court thereafter apparently adopted *The Etna* result, i.e. accorded a "lien" in the stevedore's favor over the proceeds of a longshoreman's suit. Moreover, this grant of a most extraordinary right of a lien on proceeds was extended in *Halcyon* and *Pope & Talbot, supra,* so as to include situations where stevedore negligence had been demonstrated. The basis of these decisions was, however, not that it was *appropriate* to so prefer the right of the stevedore to that of the shipowner but that it was *required* as the only alternative available which would guarantee that a longshoreman would retain right to claim compensation *and* sue for damages in a third party action against a shipowner which this Court clearly realized could be a result achieved only if the stevedore employer was assured, in all instances, of the repayment of its entire compensation obligation.

The initial expression of this Court's appreciation of the awkwardness of the 1938 amendment to § 933(b) is found in *American Stevedores* v. *Porello,* 330 U.S. 447 (1947). This Court there considered a case in which a shipowner (the United States), sued by a longshoreman who had been paid compensation without an award, joined the employing stevedore as a third party defendant seeking indemnity and/or contribution under the stevedoring contract in force at the time of plaintiff's injury. The stevedore moved to dismiss the plaintiff's cause of action, claiming that suit was barred by § 933(a), the election provision of the Act, merely by virtue of the longshoreman's acceptance of compensation without an award, as had been the case prior to 1938, despite the amendment limiting assignment of plaintiff's cause of action to instances where the compensation had been paid pursuant to an award. The Court solved this problem, created by Congress' failure to amend the statute, in a fashion achieving harmony between § 933(a) and (b), by preferring § 933(b) and by deciding that Congress intended to expand the employee's rights to give him both compensation and a suit for damages, thus beginning a yet unbroken string of decisions which in result always prefer the interests of the employee to those of the shipowner or stevedore.

The Court justified its result on the basis of the intention of Congress and on the following flaw in the argument made by the stevedore in seeking to bar its employee's suit. If mere acceptance of compensation barred suit by virtue of § 933(a) despite the 1938 amendment, *neither* the employee *nor* the employer could sue if compensation had been paid without an award. The former because he had elected compensation, the latter because on the facts of the case (i.e. there being no award) no assignment of the employee's cause of action against the shipowner had taken place. Thus a *blameless* stevedore, in no way responsible for the acci-

dent in suit, would lose its ability to recover its compensation payments to its employee unless it "forced an award" and obtained an assignment. Encouraging the employer to force an award by simply refusing in the first instance to pay compensation voluntarily was, however, clearly seen as undesirable as it would have required employers not to comply with § 914 of the Act regarding voluntary payments, and it would have deprived the employee of control over his suit against the shipowner.

In other aspects of its opinion, the *Porello* Court seemed to indicate that contribution from a negligent stevedore might be available to a shipowner. (See, e.g., *In Re Seaboard Shipping Corp.*, 449 F.2d 132 (2nd Cir. 1971)). But in 1947 the Court did not clearly perceive the effect of the shipowner's right to recover contribution from a negligent stevedore on the now firmly established and always thereafter paramount right of the employee to receive voluntary compensation without loss of his right to sue. This recognition came in 1952 in the Court's *Halcyon* decision which purportedly barred contribution among joint tortfeasors in any maritime case except one involving collision.

In the District Court in *Bacille* v. *Halcyon Lines,* 89 F. Supp. 765 (E.D.Pa. 1950) (what became the *Halcyon, supra*) the jury was required to determine the proportionate fault of shipowner and stevedore, whom the shipowner had been allowed to join in a suit for contribution by virtue of *Porello*. The jury believed the stevedore 75% to blame and the shipowner 25%, but the court entered judgment for plaintiff's verdict against both ship and stevedore on a 50-50 basis. Of course, the stevedore was allowed a credit for its compensation payments. In result, however, this meant that the party with an ability to "force an award" was to bear an equal portion of plaintiff's jury award. But this was a result it could avoid by "forcing an

award" and collusively settling with the shipowner by virtue of § 933(d) for far less than plaintiff's full damages and then deducting from the proceeds accrued compensation payments as was permitted by § 933(e).

The Court of Appeals, however, in *Baccille* v. *Halcyon Lines,* 187 F.2d 403 (3 Cir. 1951), rev'd, 342 U.S. 282 (1952), recognized the danger of allowing contribution from the stevedore/employer and decided to reduce the stevedore's incentive to exploit the obvious flaw in § 933(b) by holding that the shipowner was entitled to contribution, but only up to the amount of the stevedore's compensation liability. But the amount of this liability was necessarily "uncertain," as was recognized by this Court, because the employee could not have his *full* entitlement to compensation determined without action by the Compensation Board resulting in an "award." That is, in case of dispute over entitlement to further compensation between employer and employee, the Board would, by awarding further payments, cause an assignment. Obviously, as § 933(b) read in 1952, a negligent stevedore faced with the prospect of being sued for contribution had an interest in either refusing to pay compensation at all and obtaining an assignment if the longshoreman pursued his compensation remedy or unfairly trying to limit their payments by threat of forcing an award and obtaining an assignment.

This Court in *Halcyon* rejected the resolution thought expedient by the Court of Appeals as not a *sufficient* guarantee of assuring the longshoreman freedom from interference by his employer in his third party action. This Court held that plaintiff's judgment against the shipowner could not be reduced even by the amount of compensation liability and that the shipowner must repay to a negligent stevedore the amount of incurred compensation, as the Court later precisely ruled in *Pope & Talbot, supra.* The § 933(b) problem was thus resolved in a way "fair" to the

employee—but to him *only*. The result which this Court deliberately and as a matter of policy sought to achieve was to wholly insulate the stevedore employer, not out of any conviction that it was "fair" to do so or motive to prefer the interest of the stevedore to that of the shipowner, but out of concern for effective preservation of the longshoreman's dual right to voluntary compensation and to maintain a third party cause of action for damages which the *Porello* Court said had been established by the 1938 amendments.

Halcyon can thus be seen in light of its "facts" as little more than the reaction of the Court to the peril to the *employee's* rights raised by giving the shipowner a right to contribution from the stevedore. It can arguably be seen perhaps as solely the product of flaws in the 1938 amendment to § 933(b). But in 1974 in *Cooper* the Court itself criticized the occasional breadth of its (*Halcyon*) dictum and, consistent with *Cooper,* in 1975 in *United States* v. *Reliable Transfer,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), it restricted the application of the *Halcyon* rule of no contribution between joint tortfeasors to situations where the parties are "shielded by" the Act.

Of course the *Ryan* right of indemnity also imperiled the longshoreman's "third party" rights because indemnity, like contribution, gave the stevedore a motive to assume control of the suit to avoid its obligation to pay plaintiff's full damages imposed through breach of its newly found obligation to perform stevedoring services in a workmanlike manner. This time, however, this Court, perhaps tired of the continuation of a manifestly unjust result as between shipowner and stevedore, solved the ensuing problem arising from the stevedore's ability to "force an award" (of which Mr. Justice Black, the author of the court's *Halcyon* and *Pope & Talbot* decisions, spoke so forcefully in his dissent in *Ryan, supra*) in an entirely different manner.

On October 24, 1955, fourteen days after hearing argument in *Ryan*, this Court granted certiorari (350 U.S. 872) in *Czaplicki* v. *The Hoegh Silvercloud* and held, at 351 U.S. 525 (1956), that by virtue of the *Ryan* right of indemnity, raising the possibility of ultimate stevedore liability, the assignment provision of § 933(b) could no longer apply. Why? Because it was not *fair* to the employee to allow the stevedore to "force an award" and obtain control of his suit, which Justice Black said in his *Ryan* dissent it would do in order to avoid or reduce its ultimate liability for plaintiff's damages.

In 1959, as we mentioned, Congress amended § 933(b) in response to *Czaplicki* to provide for an assignment only after six months from an award without suit by a compensated employee. A longshoreman's compensation rights are not *now* "uncertain." See, *Halcyon, supra,* at page 284. An employee *can* exhaust his compensation entitlement through order of the Board without loss of his right to sue by operation of the § 933(b) assignment.

If, as the *Burnside* court held, a stevedore does not have a "lien" on the proceeds of a compensated employee's suit but is, rather, the "owner" of the right to sue a negligent shipowner for its damages (i.e. its compensation liability); and if such right of action is defeated by proof of the negligence of the stevedore employer, by virtue of *Halcyon* as *Burnside* also holds; if, further, the shipowner is, as is clearly the case by virtue of § 905(b), *also* "shielded by" the Act (*Cooper, supra,* at page 110); if *Halcyon* still applies in such circumstances, i.e. if the stevedore must sue to recover its compensation liability and must lose if negligent—then any verdict in the employee's favor will be reduced by the amount of the "lien" upon proof of a degree of stevedore complicity; and this sum would not only be the accrued, but also the future compensation liability of the stevedore

as well. The leverage which will be provided in order to achieve reasonable settlements of third party claims without recourse to suit is obvious. Similarly obvious is the result which obtains if the stevedore has lien rights regardless of negligence. In such instance, even if the longshoreman has been made whole through the statutory compensation scheme, suit will nonetheless be brought in order that the stevedore may recover the lien.

But what must be clearly recognized is that this result may be compelled, in the opinion of the amici curiae, by the law as it now stands and requires fashioning of no "new" rule of contribution. The mistaken concept which is at the root of the present needless inequity is the belief that the stevedore has a "lien" on proceeds of plaintiff's suit (or, an unrestricted right to recovery of compensation expenses despite negligence).

It is the view of amici curiae that *Halcyon* "was" good law on its facts because of flaws in § 933(b) of the Act and that the rule of the case "still is" good law because the Act (§ 905(b)) now forbids contribution for plaintiff's actual damages beyond his compensation entitlement in favor of the ship from the stevedore. Basic fairness therefore should require that the stevedore have no such right against the shipowner. In short, the negligent shipowner should pay plaintiff's real damages, and the negligent stevedore should pay compensation, as Congress intended.[4]

The foregoing analysis has been urged in but one case since passage of the 1972 Amendments. In *Landon* v. *Lief Hoegh & Co., Inc.*, 521 F.2d 756 (2 Cir. 1975), certiorari

4. "It is important to note that adequate workman's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." Senate Report No. 92-1125, 92nd Congress, 2nd Session (subsection "Safety").

sought on other grounds and denied (423 U.S. 1053 (1976)), the Second Circuit Court of Appeals suggested, but held that it need not decide, that § 905(b) "overruled" *Burnside*. But in this respect and others, the court's reasoning was faulty.[5] Section 905(b) provides:

> In the event of injury to a person covered under this Act . . . then such person, or anyone otherwise entitled to recover damages by reason thereof may bring an action against . . . [the] vessel . . . in accordance with the provisions of § 33 [933] of this Act . . .

Obviously, § 905(b) applies only to injured persons entitled to compensation and others "otherwise entitled." It does not apply, for example, to Jones Act seamen who are not entitled to compensation and who retain a right to sue a shipowner for unseaworthiness for precisely the reason that the Act itself does not apply to them. Section 905(b) also provides that the section is the sole remedy for those to whom it does apply, e.g. a suit for negligence *is* the sole remedy for longshoremen who *are* entitled to compensation. Burnside held that § 933 (as opposed to § 905) did *not* cut off the stevedore's common law right to sue the shipowner for its compensation liability, and § 933 was not significantly amended in 1972. Thus, § 905(b) includes the stevedore as an "otherwise entitled" party or it does not. This, as yet, has not been expressly decided. If it does, the other remedy of the stevedore, its equitable remedy of a lien on proceeds, is cut off and by § 905(b) itself. On the contrary, if it does not, then § 905(b) does not affect the stevedore's

5. In *Landon*, the stevedore's insurer was joined by the shipowner under Rule 19 F.R.Civ.P. as an additional party plaintiff. The basis of this joinder was that concurrent ship and stevedore negligence would result in imposition on the shipowner of liability. The shipowner in that case sought a determination that in such joint negligence cases, the shipowner should only be liable for that portion of a longshoreman's damages award in excess of compensation benefits. The Second Circuit mistakenly viewed the argument as an effort to demonstrate that any stevedore negligence avoided any shipowner's liability.

right to sue the shipowner by virtue of its *Burnside* right, which is not "cut off" by the unamended § 933(b).

In either event, the stevedore can sue the shipowner, and the "lien on proceeds"—based, as we have seen, on the mistaken belief that the stevedore could *not* sue the shipowner because of § 933(b)—can no longer be justified. Moreover, the considerations of policy underlying *Halcyon* and *Pope & Talbot* no longer exist, by virtue not of the 1972 Amendments but the 1959 Amendments to § 933(b) which provided a six months "grace" period following a final determination of a longshoreman's compensation claim.

In view of Congress's expression of concern in respect of the volume of litigation in this area of the law (House Report (Education and Labor Committee) No. 92-1441, Sept. 25, 1972, pp. 4702-03), it is appropriate to make the following comments on the practical implications of continuing the error of assuming that even a negligent stevedore employer has a lien on the proceeds of a longshoreman's suit. Injured longshoremen must now prove notice to the shipowner of the condition causing his accident. Since this condition is often a transitory one, such notice will be claimed through the testimony of plaintiff or his co-employees that they saw the dangerous condition and "told the mate."

Under maritime law, notice to the longshoremen has been held, in the former indemnity context, to be notice to his employer. Thus, by proving plaintiff's case against the shipowner, those who testified for him will supply proof of negligence of the *employer,* which in turn will defeat the employer's claim (in a direct action against the shipowner) to recover its compensation liability. In the typical case today, where the new benefits scheme often results in fully making whole the injured longshoreman, suit would not be

brought if a lien was not thought to exist in favor of a negligent stevedore, since its compensation expenses would not otherwise be recoverable. If, however, the present mistake is perpetuated, suits will be brought and attorneys who will confer absolutely no benefit on their clients, ostensibly the longshoremen, will divide the "lien" (by agreement if not under legal compulsion) with a negligent stevedore.

Amici curiae conclude by noting that the resolution to this vital issue suggested herein has been the law in England since 1911. *Cory & Son Ltd.* v. *France Fenwick & Co., Ltd.,* 1 KB 114. It is also the law in a number of states of the United States, most notably California. *Witt* v. *Jackson,* 57 Cal. 2d 57, 366 P. 2d 641 (1961). See Larson, A. *Workmen's Compensation Law,* Vol. 2, § 75.22 (Matthew Bender 1974); *Brown* v. *Southern Ry.,* 204 N.C. 668, 169 S.E. 419 (1933). Finally, amici curiae point out that between 1956 and 1972, that is during the life of *Ryan,* it was also, effectively, the position of this Court that a negligent stevedore was not entitled to recover its lien but was *liable* to the shipowner for all actual damages recovered by the longshoreman in a third party action.

A lien on proceeds in favor of a negligent stevedore is contrary to considerations of natural justice. It could only have been law if this Court's appreciation of the injustice to parties properly of secondary interest was overborne by a policy decision that such was required to protect the interest of the person for whose benefit the Compensation Act was written and who had been guaranteed by Congress both a right to compensation and damages. Amici curiae submit the *Halcyon* and *Pope & Talbot* results would not have been reached had this Court in 1952 and 1954 been dealing with § 933(b) as amended in 1959.

The *Ryan* indemnity right was all that was overruled by Congress in 1972. Other aspects of this Court's holding in *Ryan* abide; for example the *Ryan* warranty of workmanlike service survives. *Fairmount Shipping Corp.* v. *Chevron Int. Oil Co. Inc.*, 511 F.2d 1252 (2 Cir. 1975). So does the tacit *Ryan* holding that a negligent stevedore cannot recover its "lien." This is so for two reasons: (1) Congress in 1959 amended § 933(b) to conform it to the *Ryan* holding and (2) nothing done by Congress in 1972 suggests that it *even considered* the question whether a negligent stevedore has a lien on proceeds of a longshoreman's suit.

Despite amici curiae's belief that it truly has taken no position on the merits of the question presented by petitioner i.e. whether his attorney is entitled to charge the stevedore for recapture of the "lien," amici curiae's belief that petitioner's damages is only the excess of the settlement over the amount of compensation received necessarily raises issue of the appropriateness, in the first instance, of applying the contingency agreement to the gross settlement. It would also appear that the agreement of amicus, the Master Stevedore's Association that this is inappropriate acknowledges its correct understanding that the damages of petitioner were not $60,000 but $60,000 less the "lien."

CONCLUSION

For the foregoing reasons, the existence of a lien in favor of a stevedore in all instances cannot be decided by this appeal and should be reserved for determination by the Court in a future and proper case.

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Respectfully submitted,

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